

10-18-2006

Cooke v. State Order Granting Motion Dckt. 32447

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In the Supreme Court of the State of Idaho

LAW CLERK

MAX RITCHIE COOKE,
Petitioner-Appellant,

v.

STATE OF IDAHO,
Respondent.

ORDER GRANTING MOTION
TO AUGMENT RECORD

No. 32447

A MOTION TO AUGMENT was filed by Appellant on October 13, 2006; therefore good cause appearing,

IT IS HEREBY ORDERED that Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the appeal record shall include the document/documents listed below, a filed stamped copy of which accompanied the Motion:

- 1. Affidavit of Janel Gardner.

DATED this 18 day of October, 2006

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record

AUGMENTATION RECORD

In the Supreme Court of the State of Idaho

MAX RITCHIE COOKE,)	
)	
Petitioner-Appellant,)	ORDER GRANTING MOTION(S)
)	TO AUGMENT RECORD, FILE A
v.)	REVISED APPELLANT'S BRIEF,
)	AND SUSPEND BRIEFING
STATE OF IDAHO,)	SCHEDULE
)	
Respondent.)	Supreme Court Docket No. 32447
)	Ada County Case No. 0400770

A MOTION TO AUGMENT RECORD ON APPEAL AND MOTION TO SUSPEND BRIEFING SCHEDULE with attachments was filed by counsel for Appellant December 5, 2007. Further, a MOTION FOR LEAVE TO FILE A REVISED APPELLANT'S BRIEF with AFFIDAVIT attached was filed by counsel for Appellant December 5, 2007. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT RECORD ON APPEAL be, and hereby is, GRANTED and the District Court Reporter shall prepare and lodge the transcript listed below with this Court within twenty-eight (28) days from the date of this Order and the District Court Clerk shall immediately serve counsel and file the transcript with this Court. Any corrections shall be filed with this Court as provided by I.A.R. 30.1:

1. Transcript of the September 26, 2007 Evidentiary Hearing.
(Court Reporter Tammy Hohenleitner)

IT FURTHER IS ORDERED that the augmentation record shall include the documents listed below, copies of which accompanied the Motion:

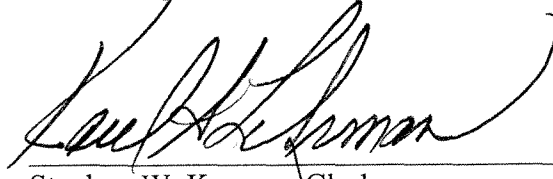
1. April 10, 2007 Court Minutes;
2. April 27, 2007 Court Minutes;
3. August 27, 2007 Court Minutes;
4. State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss, file stamped September 13, 2007;
5. September 26, 2007 Court Minutes;
6. Supplemental Memorandum in Support of Petition for Post-Conviction Relief, file stamped October 2, 2007;
7. State's Memorandum on the Petitioner's Claim of Ineffective Assistance of Counsel, file stamped October 3, 2007; and
8. Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel, file stamped November 13, 2007.

IT FURTHER IS ORDERED that Appellant's MOTION FOR LEAVE TO FILE A REVISED APPELLANT'S BRIEF be, and hereby is, GRANTED.

IT FURTHER IS ORDERED that the Appellant's MOTION TO SUSPEND BRIEFING SCHEDULE be, and hereby is, GRANTED and proceedings in this appeal are SUSPENDED until the transcript listed above is filed with this Court at which time the due date for filing a REVISED APPELLANT'S BRIEF shall be reset which shall be thirty-five (35) days thereafter.

DATED this 26th day of December 2007.

For the Supreme Court

A handwritten signature in black ink, appearing to read "Stephen W. Kenyon", written over a horizontal line.

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Reporter Tammy Hohenleitner

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

ERIK R. LEHTINEN
Deputy Appellate Public Defender
I.S.B. # 6247
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAX RITCHIE COOKE,)
)
Petitioner-Appellant,)
)
v.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

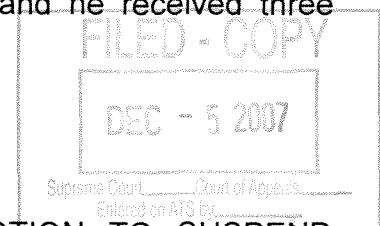
COPY
CASE NO. 32447

MOTION TO AUGMENT RECORD ON
APPEAL AND MOTION TO SUSPEND
BRIEFING SCHEDULE

Max Ritchie Cooke, by and through his counsel of record, and pursuant to Idaho Rules of Appellate Procedure 13.2, 30, and 32(c), hereby moves for an order of this Court augmenting the record on appeal with eight (8) documentary items and one (1) transcript and, further, suspending the briefing schedule until such time as the requested transcript can be prepared, filed with this Court, and served upon the parties.

Relevant Facts

In 2003, Mr. Cooke was convicted of one count of second degree kidnapping, one count of aggravated battery, and one count of assault, and he received three



concurrent prison sentences. (R., pp.11-12; 48.) In 2004, Mr. Cooke filed a *pro se* petition for post-conviction relief. (R., pp.11-20.)

On June 6, 2005, Mr. Cooke, this time through counsel, filed a verified Amended Petition for Post-Conviction Relief. (R., pp.47-52.) In his amended petition, Mr. Cooke asserted four claims for relief:

- 1) There is new evidence, not previously presented, which requires vacation of Mr. Cooke's conviction. Specifically, there is new evidence indicating that one of the State's key witnesses, the victim of Mr. Cooke's alleged crimes, Alison Cooke, was not competent to have testified at Mr. Cooke's trial due to memory losses suffered as a result of head injuries sustained in a motor vehicle accident.
- 2) Mr. Cooke's trial counsel was ineffective for failing to: (a) procure the services of a medical expert who could have testified as to Ms. Cooke's incompetence or, at least, impeached her testimony with evidence that she was at substantial risk for having false memories; and (b) adequately cross-examining Ms. Cooke regarding her memory loss.
- 3) Mr. Cooke's trial counsel was ineffective for failing to timely file a notice of appeal as requested by Mr. Cooke.
- 4) Mr. Cooke was prevented from timely filing a *pro se* notice of appeal when the prison paralegal misadvised Mr. Cooke as to his filing deadline and refused to notarize or mail Mr. Cooke's notice of appeal.

(See R., pp.47-52.) Ultimately, however, the district court dismissed Mr. Cooke's petition in its entirety. (R., pp.85-88.)

On October 27, 2005, Mr. Cooke filed a Notice of Appeal. (R., pp.89-91.) Almost a year later, on October 11, 2006, Mr. Cooke filed his Appellant's Brief. In his Appellant's Brief, Mr. Cooke argued that the district court erred in summarily dismissing his amended petition for post-conviction relief, and he requested that the order of dismissal be vacated and his case be remanded for an evidentiary hearing on each of his four claims. (See *generally* Appellant's Brief.)

Upon receipt of Mr. Cooke's Appellant's Brief, the State agreed with at least some of Mr. Cooke's contentions and moved this Court for an order remanding Mr. Cooke's case for: (a) reconsideration, in light of a more complete record, of Mr. Cooke's two claims relating to the competency of Alison Cooke; and (b) an evidentiary hearing on Mr. Cooke's claim that his attorney was ineffective for failing to timely file a notice of appeal. (*See generally* Motion for Remand and Statement in Support Thereof (Dec. 28, 2006).) The State's motion did not address Mr. Cooke's claim regarding the prison paralegal. (*See* Motion for Remand and Statement in Support Thereof, p.2 n.1 (Dec. 28, 2006).)

On February 2, 2007, this Court granted the State's motion and remanded Mr. Cooke's case to the district court. (Order Granting Motion for Remand (Feb. 2, 2007).) It also ordered the present appeal stayed pending submission of a certified copy of the district court's order. (Order Granting Motion for Remand (Feb. 2, 2007).)

On remand, the district court held numerous status hearings (*see generally* April 10, 2007 Court Minutes (attached); April 27, 2007 Court Minutes (attached); August 27, 2007 Court Minutes (attached)), and set an evidentiary hearing on Mr. Cooke's petition (*see* August 27, 2007 Court Minutes, p.1 (attached)). Prior to that evidentiary hearing, however, the State filed a "State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss." (*See* State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss (attached).) Apparently, the purpose of that filing was to renew the State's motion for summary

dismissal of Mr. Cooke's two claims relating to the competency of Alison Cooke.¹ (See State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss, p.3 (attached).)

The district court, however, apparently never addressed the State's renewed request for summary dismissal and, instead, on September 26, 2007, proceeded with the previously-scheduled evidentiary hearing. (See *generally* September 26, 2007 Court Minutes (attached).) At that hearing, the district court heard testimony from at least seven witnesses and accepted at least six exhibits into evidence; it heard arguments from both parties' counsel; and it apparently made at least one factual finding.² (See September 26, 2007 Court Minutes (attached).) However, the district court refrained from deciding all contested issues and, instead, allowed the parties additional time to submit briefing on the issue of whether Mr. Cooke should be granted relief on his claims regarding his untimely-filed notice of appeal. (September 26, 2007 Court Minutes, p.4 (attached).)

On October 2, 2007, Mr. Cooke submitted a supplemental memorandum arguing that he was entitled to relief on his two claims concerning the untimely notice of appeal. (See *generally* Supplemental Memorandum in Support of Petition for Post-Conviction

¹ The State's "Additional Response" was based solely on its reading of a portion of the transcript from Mr. Cooke's trial in his underlying criminal case. (See State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss (attached).) However, although the State asserted that *the State* had received that transcript, and it made numerous representations as to what that transcript contained, the State apparently did not attach that transcript to its submission to the district court. (See *generally* State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss (attached).)

² The district court found that Alison Cooke had not been incompetent when she testified at Mr. Cooke's trial. (September 26, 2007 Court Minutes, p.3 (attached).) Although this factual finding would seem to require the denial of Mr. Cooke's first post-conviction claim (that new evidence regarding Ms. Cooke's incompetence requires a new trial) and, perhaps, his second claim (that his counsel was ineffective for failing to adequately impeach Ms. Cooke regarding her recollection of events), the court minutes are not

Relief (attached).) The following day, the State submitted a memorandum taking a contrary position, at least as to one of Mr. Cooke's claims.³ (See generally State's Memorandum on the Petitioner's Claim of Ineffective Assistance of Counsel (attached).)

On November 13, 2007, the district court issued its Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel (attached), in which it addressed all (or most) of Mr. Cooke's claims, including those that had apparently been addressed orally at the evidentiary hearing. (See generally Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel (attached).) It reiterated its finding that Alison Cooke had been competent when she testified at Mr. Cooke's trial, and it declined to grant Mr. Cooke a new trial. (Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel, pp.2-4 (attached).) However, it also went on to find that Mr. Cooke had timely requested an appeal from his attorney, but that one was not timely filed, and that Mr. Cooke had also timely sought assistance from the prison paralegal in getting his appeal filed, but the assistance he received resulted in his filing of a late notice of appeal. (Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel, pp.4-6 (attached).) It indicated that it would re-enter judgment against Mr. Cooke so that he might have another opportunity to file a timely notice of appeal. (Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel, pp.5-6 (attached).)

entirely clear as to whether those claims were specifically denied at that time. (See September 26, 2007 Court Minutes, p.3 (attached).)

³ The State's memorandum addressed only Mr. Cooke's ineffective assistance of counsel claim; it did not address the claim that he had been denied access to the courts by prison personnel. (See generally State's Memorandum on the Petitioner's Claim of Ineffective Assistance of Counsel (attached).)

Given the district court's November 13, 2007 issuance of its Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel, Mr. Cooke anticipates that the stay of the appellate proceedings will immediately be lifted. Assuming that it is, Mr. Cooke requests that the record on appeal be augmented with the above-referenced (and attached) documents, as well as the transcript of the September 26, 2007 evidentiary hearing.

Motion to Augment Record on Appeal

Pursuant to I.A.R. 30 and 32(c), Mr. Cooke respectfully requests that the record on appeal be augmented with copies of the following nine (9) items:

1. April 10, 2007 Court Minutes (attached);
2. April 27, 2007 Court Minutes (attached);
3. August 27, 2007 Court Minutes (attached);
4. September 13, 2007 State's Additional Response to the Petition for Post-Conviction Relief and Motion to Dismiss (attached);
5. September 26, 2007 Court Minutes (attached);
6. October 2, 2007 Supplemental Memorandum in Support of Petition for Post-Conviction Relief (attached);
7. October 3, 2007 State's Memorandum on the Petitioner's Claim of Ineffective Assistance of Counsel (attached);
8. November 13, 2007 Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel (attached); and
9. Transcript of September 26, 2007 evidentiary hearing (not attached because not yet transcribed; Tammy Hohenleitner, Reporter).

All of the above items are necessary for undersigned appellate counsel to: (a) determine which of the claims raised in Mr. Cooke's original Appellant's Brief have been mooted by the district court's actions on remand and which, if any, are still viable; (b) determine what additional claims may now be viable given the district court's actions on remand⁴; (c) advise Mr. Cooke about the value of proceeding with the present appeal; and (d) assuming that additional appellate claims are now viable, present an adequate record and effectively brief those claims. With regard to concerns (b) and (d), the fact that the district court held an evidentiary hearing, after which it found facts against Mr. Cooke and ultimately denied at least one of Mr. Cooke's post-conviction claims, raises the possibility that, if nothing else, the district court's fact-finding was clearly erroneous and the district court, therefore, erred in dismissing Mr. Cooke's claim(s). In such a situation, Mr. Cooke would be required to support such a claim with a transcript of the evidentiary hearing (item no. 9, above) and a copy of the district court's findings of fact and conclusions of law (item no. 8, above). *State v. Coma*, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999). His failure (or inability) to do so might preclude this Court from reaching the merits of his claim and, thus, Mr. Cooke would be denied a meaningful appeal of the district court's actions on remand.⁵

Counsel for the State has not been contacted in regard to the instant motion.

⁴ Contemporaneously herewith, Mr. Cooke has filed a Motion for Leave to a File a Revised Appellant's Brief. Assuming that motion is granted, Mr. Cooke would be able to raise and argue any additional claims necessitated by the district court's actions on remand in his Revised Appellant's Brief.

⁵ Theoretically, of course, Mr. Cooke could file a separate notice of appeal from the district court's findings of fact and conclusions of law, but having two appeals for the same post-conviction case—especially

Motion to Suspend Briefing Schedule

As noted above, the present appeal is presently stayed pursuant to this Court's order of February 2, 2007. However, that order indicates that the stay will be lifted upon the district court's submission of a certified copy of its findings of conclusions of law, at which time the stay will be lifted. Thus, anticipating that the existing stay will soon be lifted (if it has not been lifted already), Mr. Cooke respectfully requests, pursuant to I.A.R. 13.2 and 32(c), that this Court again order that the briefing schedule be suspended, this time, for so long as is necessary for the court reporter to prepare the transcript of the evidentiary hearing, and serve the same upon this Court and the parties.

Counsel for the State has not been contacted in regard to the instant motion.

DATED this 5th day of December, 2007.


ERIK R. LEHTINEN
Deputy State Appellate Public Defender

where all post-conviction matters could be resolved through the present appeal—would be an inefficient use of judicial resources.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of December, 2007, caused a true and correct copy of the attached MOTION TO AUGMENT RECORD ON APPEAL AND MOTION TO SUSPEND BRIEFING SCHEDULE to be hand delivered to Attorney General's mailbox at Supreme Court for:

KENNETH K. JORGENSEN
ATTORNEY AT LAW
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010


EVAN A. SMITH
Legal Secretary

ERL/eas

Session: McLaughlin041007
Session Date: 2007/04/10
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 14:49

Courtroom: CR508

Clerk(s):
Gagnepain, Melanie
Hunt, Angela

State Attorneys:
Bourne, Roger

Public Defender(s):
DeAngelo, Michael

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case Number: SPOT0400770
Plaintiff: COOKE
Plaintiff Attorney:
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender: DeAngelo, Michael

2007/04/10

16:09:57 - Operator
Recording:
16:09:57 - New case
STATE OF IDAHO,
16:10:17 - Public Defender: DeAngelo, Michael
present for Mr. Cooke
16:10:42 - State Attorney: Bourne, Roger
present for State of Idaho
16:10:54 - Judge: McLaughlin, Michael R.
Review of Order
16:11:43 - Public Defender: DeAngelo, Michael
16:12:16 - State Attorney: Bourne, Roger
Speaks as to what Attorney General's position was as relayed
to him
16:13:42 - Judge: McLaughlin, Michael R.
Discussion
16:14:49 - Judge: McLaughlin, Michael R.
set for 04/27/07 at 11:00am
16:15:04 - Operator
Stop recording:

Session: mclaughlin042707
Session Date: 2007/04/27
Judge: McLaughlin, Michael R.
Reporter: Hirmer, Jeanne

Division: DC
Session Time: 08:26

Courtroom: CR507

Clerk(s):
Brown, Kristin

State Attorneys:
Alidjani, Fafa
Haws, Joshua
Lorello, David
Udink, Denyce

Public Defender(s):
DeAngelo, Michael
Odessey, Edward

Prob. Officer(s):

Court interpreter(s):

Case ID: 0024

Case Number: SPOT0400770
Plaintiff: Cooke, Max
Plaintiff Attorney:
Defendant: State of Idaho
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender: DeAngelo, Michael

2007/04/27

11:11:59 - Operator
Recording:
11:11:59 - New case
State of Idaho,
11:12:12 - Defendant: State of Idaho
not present,
11:12:18 - State Attorney: Bourne, Roger
present for State
11:12:30 - Public Defender: DeAngelo, Michael
present for petitioner
11:12:38 - Judge: McLaughlin, Michael R.
case remanded back to Court on issue - witness testimony
11:13:46 - Judge: McLaughlin, Michael R.
will schedule 2 days for hearing
11:14:59 - Judge: McLaughlin, Michael R.
will set hearing 2 days 9/26-9/27 9-2pm - Hwy
11:15:23 - Judge: McLaughlin, Michael R.
Monday 8/27/07 at 3pm - will issue scheduling order
11:16:37 - Operator

+ H0300279

Status

Stop recording:

Session: mclaughlin082707
Session Date: 2007/08/27
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 08:07

Courtroom: CR510

Clerk(s):
Brown, Kristin

State Attorneys:
Bourne, Roger

Public Defender(s):
DeAngelo, Michael

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case Number: SPOT0400770
Plaintiff: Cook, Max Ritchie
Plaintiff Attorney:
Defendant: State of Idaho
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender: DeAngelo, Michael

2007/08/27

15:04:03 - Operator
Recording:
15:04:03 - New case
State of Idaho,
15:04:37 - State Attorney: Bourne, Roger
present, as to hearing 9/26-27 - will be ready to proceed
15:05:04 - Public Defender: DeAngelo, Michael
present - as to hearing
15:09:21 - Judge: McLaughlin, Michael R.
as to focus of hearing - will hear as scheduled
15:09:42 - Operator
Stop recording:

NO. _____ FILED _____
A.M. 10:43 P.M.

SEP 13 2007

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)
)
Petitioner,)
vs.)
)
MAX RITCHIE COOKE,)
)
Respondent,)
)
_____)

Case No. SPOT0400770D
STATE'S ADDITIONAL
RESPONSE TO THE PETITION
FOR POST CONVICTION
RELIEF AND MOTION TO
DISMISS

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and puts before the Court the State's additional response to the claim made by the petitioner that Allison Cooke was incompetent as a witness due to her memory loss and the related claim that Karl Shurtliff provided ineffective assistance of counsel by failing to discredit her through cross-examination. The State has received a transcript of Allison Cooke's testimony from the trial. In this further response, the State will draw the Court's attention to

certain portions of that transcript which show that the jury had a full and complete understanding of Allison Cooke's mental condition from direct and cross-examination.

On page 3 of the transcript, Ms. Cooke testified that she was working part time for the Meridian City service billing department, but prior to the crash she had worked there full time. On page 7, she testified that because of the car crash she had received head injuries which affected her memory. She testified that she remembered some of the big items but had forgotten some details, Tr. pg 7, lines 1-8.

Beginning on page 38, she described what her injuries were. She testified that she didn't have any recollection of what happened to her between the night of the crash and waking up in the hospital nearly three weeks later. She advised that her balance had been affected and that she was in physical and mental therapy, Tr. pg 42.

A reading of Ms. Cooke's testimony shows that she remembers most of the details of the events on the relevant days. She was able to relate the relevant events in a coherent and logical sequence. She was forthcoming about her lack of memory on some details. An example is shown on page 75, where she no longer remembered the defendant dramatically swerving the vehicle before they went off the road. She had apparently remembered it to tell the police, but could not recall it at the time of the trial. Tr. pg 75, lines 1-9. She could not remember where the defendant stopped the truck and so testified. Tr. pg 32, lines 17-18. She could not recall what the defendant said to her during a particular event. Tr. pg 33, lines 16-17.

Trial counsel thoroughly cross-examined Ms. Cooke. A reading of the transcript shows that he questioned Ms. Cooke about her desire to divorce the defendant and have sole legal custody of their child. Tr. pg 44. This would show her bias. He brought out that Ms. Cooke had lied to the defendant about where she intended to be on the night of the crash. Tr. pg 47, lines


16-25. Counsel brought out that Ms. Cooke had been drinking before the crash. Tr. pg 48, line 6. Counsel showed an inconsistency between Ms. Cooke's testimony that she had seen Shane McCubbins in person on the night in question, but that she had told interviewing police officers earlier that she had only spoke to McCubbins on the telephone. Tr. pg 48. Counsel also examined Ms. Cooke on her inconsistency between telling detectives that she first saw the defendant at her driver's side window when she pulled up in front of her brother's house, versus her testimony at trial that she remembered seeing the defendant coming out from behind a tree, Tr. pg 51. Counsel also showed through his examination of Ms. Cooke that the defendant was a good father to their child Ryan. Tr. pg 70, lines 4-8.

There is no evidence from the transcript referred to indicating that Allison Cooke was an incompetent witness. There is no evidence showing that trial counsel was ineffective in his cross-examination of Ms. Cooke. The petitioner has failed to show what further questions trial counsel could have asked and what information the questions would have elicited that would have likely changed the outcome of the trial. The petitioner has failed to show that trial counsel was ineffective in any respect and he has failed to show that he was prejudiced by trial counsel's conduct.

The State has previously moved this Court to dismiss the Petition for Post Conviction Relief. The Court's dismissal was remanded due to a lack of the transcript referred to above. Now that that transcript is available, it is clear that the Court's decision dismissing the petition was correct in the first place and the State requests that the Court so find and dismiss this allegation.

RESPECTFULLY SUBMITTED this 12th day of September 2007.

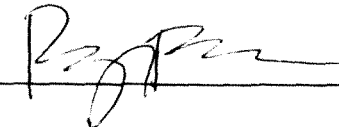
GREG H. BOWER
Ada County Prosecutor



Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that a true and correct copy of the foregoing document was delivered to Ada County Public Defender, 200 West Front Street, Room 1107, Boise, Idaho 83702, through the Interoffice Mail, this 12 day of September 2007.



Session: mclaughlin092607
Session Date: 2007/09/26
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 08:56

Courtroom: CR508

Clerk(s):
Brown, Kristin

State Attorneys:
Alidjani, Fafa
Bourne, Roger
Haws, Joshua
Lorello, David

Public Defender(s):
DeAngelo, Michael
Steveley, Craig

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case Number: SPOT0400770
Plaintiff:
Plaintiff Attorney:
Defendant: Idaho, State of
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender: DeAngelo, Michael

2007/09/26

08:57:49 - Operator
Recording:
08:57:49 - New case
Idaho, State of
08:58:30 - Operator
Stop recording:
09:08:26 - Operator
Recording:
09:08:26 - Record
Idaho, State of
09:08:32 - Judge: McLaughlin, Michael R.
calls case - post conviction relief
09:08:46 - Plaintiff:
Max Ritchie Cooke
09:09:00 - Other: Cooke, Max
petitioner in custody - penn
09:09:12 - State Attorney: Bourne, Roger
present
09:09:22 - Public Defender: DeAngelo, Michael

present for petitioner
09:09:35 - Judge: McLaughlin, Michael R.
speaks as to summary dismissal in SPOT case, appeal
09:10:27 - Judge: McLaughlin, Michael R.
failure of petitioners counsel to file notice of appeal
09:11:48 - Judge: McLaughlin, Michael R.
as to exhibits
09:11:54 - State Attorney: Bourne, Roger
to Court
09:13:48 - Judge: McLaughlin, Michael R.
petitioner exhibit 1 admitted
09:15:14 - Public Defender: DeAngelo, Michael
opening statement to Court, as to remanded issues
09:16:46 - State Attorney: Bourne, Roger
will defer opening remarks
09:18:20 - Other: Cooke, Max
sworn as witness
09:18:28 - Public Defender: DeAngelo, Michael
examination of witness
09:33:00 - Judge: McLaughlin, Michael R.
Pet. Ex. 2 admitted
09:34:53 - Judge: McLaughlin, Michael R.
Pet. Ex 3 admitted
09:38:34 - State Attorney: Bourne, Roger
no questions
09:38:38 - Judge: McLaughlin, Michael R.
no questions
09:38:46 - Public Defender: DeAngelo, Michael
calls next witness
09:39:38 - Other: Marinez, Sgt. Delberto
sworn as witness - ICC
09:43:05 - State Attorney: Bourne, Roger
to witness
09:45:00 - Public Defender: DeAngelo, Michael
re-direct to witness
09:45:21 - State Attorney: Bourne, Roger
one follow up question
09:46:53 - Other: Excused, Witness
09:47:09 - Other: Cooke, Alison
sworn as witness
09:47:53 - Public Defender: DeAngelo, Michael
examination of witness - Alison Archileta
09:53:41 - State Attorney: Bourne, Roger
speaks as to objection to letter/affidavit
09:56:10 - Judge: McLaughlin, Michael R.
will admit Pet. 5,
10:16:42 - Judge: McLaughlin, Michael R.
ex 4 conditionally admitted
10:16:55 - State Attorney: Bourne, Roger
exam of witness
10:22:25 - Judge: McLaughlin, Michael R.
questions witness
10:28:11 - Other: Excused, Witness
10:28:35 - Other: Richards, Larry
sworn as a witness
10:31:19 - Public Defender: DeAngelo, Michael
examination of witness
10:38:30 - Other: Excused, Witness

10:38:35 - Operator
Stop recording:
10:50:10 - Operator
Recording:
10:50:10 - Record
Idaho, State of
10:50:15 - Public Defender: DeAngelo, Michael
calls next witness
10:50:42 - Other: Shurtliff, Karl
sworn as witness
10:50:55 - Public Defender: DeAngelo, Michael
exam of witness
11:07:47 - Judge: McLaughlin, Michael R.
ex 6 admitted
11:11:40 - Judge: McLaughlin, Michael R.
ex 7 admitted
11:26:24 - Public Defender: DeAngelo, Michael
follow up questions to witness
11:34:00 - Other: McMillan, Timothy
sworn as witness
11:42:27 - Judge: McLaughlin, Michael R.
to witness
11:44:35 - Public Defender: DeAngelo, Michael
no further evidence
11:44:42 - Public Defender: DeAngelo, Michael
petitioner rests
11:45:31 - State Attorney: Bourne, Roger
intends to call witness
11:45:42 - State Attorney: Bourne, Roger
calls witness
11:46:06 - Other: Gardner, Janelle
sworn as witness
11:46:11 - State Attorney: Bourne, Roger
exam of witness
12:07:13 - State Attorney: Bourne, Roger
to witness, re-direct
12:07:56 - Public Defender: DeAngelo, Michael
follow up to witness
12:10:47 - Operator
Stop recording: (On Recess)
13:01:38 - Operator
Recording:
13:01:38 - Record
Idaho, State of
13:01:45 - Judge: McLaughlin, Michael R.
evidenciary portion of case closed
13:02:45 - Public Defender: DeAngelo, Michael
closing remarks to Court
13:23:15 - State Attorney: Bourne, Roger
to Court, closing remarks
13:42:23 - Public Defender: DeAngelo, Michael
final argument to Court
13:47:39 - Judge: McLaughlin, Michael R.
speaks to counsel, has heard evidence in case
13:47:52 - Judge: McLaughlin, Michael R.
can make findings here today
13:51:45 - Judge: McLaughlin, Michael R.
does not believe witness was incompetent to testify

14:02:39 - Judge: McLaughlin, Michael R.
on direct appeal issue, will issue written decision, if coun
sel wish, they

14:02:55 - Judge: McLaughlin, Michael R.
may submit something in writing to the Court by 10/2, then w
ill be under

14:03:13 - Judge: McLaughlin, Michael R.
advisement

14:06:27 - Operator
Stop recording:

OCT 09 2007

J. DAVID [unclear] Clerk
By [unclear] DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Petitioner
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. SPOT 04 00770 D

SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF PETITION FOR POST-
CONVICTION RELIEF

The petitioner, MAX RITCHIE COOKE, has shown, by a preponderance of the evidence at the hearing on September 26, 2007, that his trial counsel provided him with ineffective assistance of counsel for failing to timely file a Notice of Appeal, even though he had specifically requested an appeal, on the day he was sentenced, and that the State's employees at the prison failed to assist, timely notarize, and mail a Notice of Appeal for this inmate.

At the hearing, the petitioner testified that he requested his trial counsel to file an appeal on his behalf and sentence was pronounced on August 20, 2003. Such testimony was corroborated by Tim McMillin who, also, testified as to additional requests to file a Notice of

Appeal for Mr. Cooke. The petitioner followed up his oral request with a letter (October 1, 2003, Petitioner's Exhibit 2). Receiving no response to his or McMillin's requests, Mr. Cooke sought assistance from the appropriate employees at the prison on September 22, 2003, September 23, 2003, and at other times before the appeal deadline (see Petitioner's Exhibit 1). The Idaho Correctional Center Access to Courts Request showed Mr. Cooke required assistance from the paralegal for an appeal and other matters. He was persistent and kept his appointments to no avail (Petitioner's Exhibit 1; Testimony of Sergeant Martinez and Contract Attorney Larry Richards). The testimony of Janel Gardner and Larry Richards demonstrated that there was confusion as to whether weekends were to be counted in the timeline, to Mr. Cooke's detriment.

In the case of Hayes v. State, 143 Idaho 88, 90-91, 137 P.3d 475 (2006) it was held that even though inmate Hayes's Notice of Appeal was lost in the mail and never found, it was deemed timely filed in light of evidence that he showed an Idaho Department of Corrections Access to Court request form requesting action for an appeal nine days before the deadline. Had the paralegal, Janel Gardner, on September 23, promptly and reasonably assisted Mr. Cooke, he would have had a Notice of Appeal prepared and mailed well within the timeline or the mailbox rule. Munson v. State, 128 Idaho 639, 642-43, 917 P.2d 796 (1996). Under circumstances like Mr. Cooke faced, it has been held that the court would consider the defendant's notice of appeal despite his failure to comply with the forty-two-day time limit on the basis of judicial economy and the court's plenary jurisdiction under Idaho Constitution, Article 5, Section 9. The petitioner showed he wanted to file an appeal and his persistent attempts to obtain assistance from the State's paralegal employed to help inmates should be viewed as sufficient to be construed as the functional equivalent of a notice of appeal. State v. Baker, 142 Idaho 411, 418-419, 128 P.3d 948 (Ct.App. 2005), *review denied* (2005).

A paralegal is a person with legal skills who works under the supervision of a lawyer, with many job duties, including drafting motions, subpoenas, appeal notices, and filing papers with the courts. Mr. Cooke had a reasonable belief that he had assistance and access to the courts but did not receive reasonable assistance (see testimony of Janel Gardner, Sgt. Martinez, and Larry Richards).

Inmate Lee's Notice of Appeal was received by the clerk three days late. Like Mr. Cooke, Lee had attorney representation whose counsel failed to appeal and took no action with regard to the appellate court's twenty-one-day opportunity to challenge a conditional dismissal for untimely filing. Trial counsel failed to do anything on his own not to notify and advise the defendant thereof. This non-action falls below an objective standard of reasonableness. State v. Lee, 117 Idaho 203, 204-205, 786 P.2d 59 (Ct.App. 1990). (See Petitioner's Exhibit 7 ORDER CONDITIONALLY DISMISSING APPEAL, November 7, 2003).

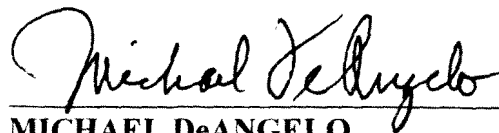
After a contested jury trial, conviction on all counts, and substantial sentence, trial counsel failed to meet the cited standards of the American Bar Association of the necessity of providing a defendant a frank discussion of the merits of an appeal. Davis v. State, 116 Idaho 401, 411, 775 P.2d 1243 (Ct.App. 1989). The record shows trial counsel did not fulfill his obligation to notify Mr. Cooke of his right to appeal, nor the time-line, nor assist him to appeal, nor of the order of conditional dismissal. State v. Rodriguez, 119 Idaho 895, 811 P.2d 505 (Ct.App. 1991).

Mr. Cooke was denied reasonable assistance from the State's employees and his trial counsel failed to conduct a proper inquiry and advise of appeal rights under the circumstances of this case. Roe v. Flores-Ortega, 528 U.S. 470, 478-480 (2000).

Although the United States Supreme Court in Roe indicated that an inmate did not have to prove his appeal had merit, Mr. Cooke has been prejudiced in his right to appeal, *inter alia*, whether the jury's verdict was against the weight of the evidence, the Court's rulings on IRE 404(b) evidence of the defendant's prior conduct which placed him in a prejudicial light, and the severity of the sentence imposed. Sixth Amendment to the United States Constitution; Article I, section 13, of the Idaho State Constitution; and Idaho Code §§ 19-4901(a)(1), (2); Strickland v. Washington, 466 U.S. 668 (1984); Hernandez v. State, 127 Idaho 690, 905 P.2d 91 (Ct.App.), *affirmed* 127 Idaho 685, 905 P.2d 86 (1995).

WHEREFORE, the petitioner requests the Court to grant the relief sought in the petition.

DATED, this 2nd day of October 2007.



MICHAEL DeANGELO
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 2 day of October 2007, I mailed a true and correct copy of the foregoing to:

**ROGER BOURNE
COUNSEL FOR RESPONDENT
ADA COUNTY PROSECUTOR**

- U.S. MAIL
- HAND DELIVERED
- FACSIMILE
- INTERDEPARTMENTAL MAIL


Jacob R. Precht

OCT 03 2007

J. DAVID NAVARRO, Clerk
By J. EARLE DEPUTY
RECEIVED

OCT 02 2007

ADA COUNTY
PROSECUTING ATTORNEYS OFFICE

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO.)
)
Respondent.)
_____)

Case No. SPOT0400770D

**STATE'S MEMORANDUM ON
THE PETITIONER'S CLAIM OF
INEFFECTIVE ASSISTANCE OF
COUNSEL**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and puts before the Court the State's view of the law relating to the petitioner's claim that trial counsel provided ineffective assistance on petitioner's appeal issue. Pursuant to the Court's request, the State has reviewed Idaho Appellate decisions to determine whether trial counsel's failure to file notice of appeal constitutes ineffective assistance of counsel if the defendant requested an appeal, but did not identify any appealable issue.

The answer to the above questions appears to be yes. In the case of *Beasley v. State*, 126 Idaho 356 (Ct.App. 1994), the Court considered whether the defendant's bare request for an appeal required trial counsel to file a notice. The State's view of the *Beasley* holding is that trial counsel is required to file a notice of appeal when requested to do so by the defendant. It is not required that the defendant/petitioner in post-conviction prove that he was likely to succeed on appeal. The prejudice appears to be the missed opportunity to file an appeal and not the likelihood of success on appeal. Therefore, if the Court were to find that Cooke did make a request of trial counsel to file an appeal, it would have been deficient conduct for trial counsel to have not done so. No further showing of prejudice is necessary. See also *Loveland v. State*, 141 Idaho 933 (Ct.App. 2005).

The State has earlier argued that the Court should find from the evidence that Cooke did not make a request for an appeal until after his time had run. The State still holds to that view, but believes that the inquiry may need to go further. The State believes that trial counsel testified that he had no discussion with Cooke about a potential appeal. In the case of *Davis v. State*, 116 Idaho 401 (Ct.App. 1989) the Court found that trial counsel's conduct was reasonable because trial counsel had discussed the merits of a potential appeal with the defendant. Trial counsel had not filed an appeal because it was counsel's view that, after the discussion, the defendant no longer desired an appeal. However, the Court of Appeals seemed to imply that trial counsel's responsibilities also included a discussion with the defendant about the merits and probable outcome of an appeal. 116 Idaho at 411.

The United States Supreme Court has modified the *Davis* holding in *Roe v. Flores-Ortega*, 528 US 470 (2000). In that case, the United States Supreme Court held that:

Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all of the information counsel knew or should have known. See *Strickland* 466 US at 690, (focusing on the totality of the circumstances). Although nondeterminative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the Court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all of all of the appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

In this case, *Ortega* pled guilty, and was sentenced, but his attorney did not file a notice of appeal. As the Supreme Court stated in the opinion, “the question presented in this case lies between those poles: is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?” at page 477. Or stated another way, “under what circumstances does counsel have an obligation to consult with the defendant about an appeal?” pg 478.

The Court went onto say that the best practice is for trial counsel to routinely consult with the defendant about the possibility of an appeal. The Court held that the American Bar Association’s standards on that practice are, “only guides.” The Court held that, “we cannot say, as a Constitutional matter, that in every case counsel’s failure to consult with a defendant about an appeal is necessarily unreasonable and therefore deficient. Such a holding would be inconsistent with both our decision in Strickland and common sense.”

The Court of Appeals cited the *Flores-Ortega* holding in *Pecone v. State*, 135 Idaho 865 (Ct.App. 2001) as constitutionally imposing a duty on trial counsel to consult with the defendant about an appeal where “there is reason to think either (1) that a rational defendant would want to appeal..., or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Flores-Ortega*, 528 U.S. at 480. 135 Idaho at 869.


It is the State’s view then that trial counsel had a duty to consult with Cooke about an appeal if he had reason to think either that Cooke would want to appeal on nonfrivolous grounds or under circumstances where Cooke, “reasonably demonstrated to counsel that he was interested in appealing.” The State has earlier argued that the defendant did not demonstrate an interest in appealing. The question remains then whether trial counsel had a reason to think that Cooke would want to appeal on nonfrivolous grounds. The State recalls that Mr. Shurtliff testified that he did not know what grounds there would have been for an appeal. The undersigned knows of no nonfrivolous grounds for an appeal and believes that none were shown by the evidence in the post-conviction hearing. The State is aware of course, that sentences are frequently appealed. This sentence is clearly within the limits authorized by statute, and so an appeal of this sentence would seem to be frivolous.

The defendant claims that he tried to call counsel without success. He waited to write a letter until it was too late. Counsel acted as soon as he was informed. Counsel could reasonably have assumed that Cooke was not interested in an appeal because Cooke didn’t demonstrate an interest. This suggests that counsel’s duty to consult was not triggered.

For those reasons, the State believes that the defendant's petition should be denied.

RESPECTFULLY SUBMITTED this 1st day of October 2007.

GREG H. BOWER
Ada County Prosecutor



Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to Ada County Public Defender, 200 West Front Street, Room 1107, Boise, Idaho 83702, through the Interoffice Mail, this 1st day of October 2007.



ERC

NOV 13 2007

J. DAVID YAVARRO, Clerk
By *[Signature]*
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RICHIE COOKE,

Case No. SPOT0400770D

Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
PETITIONER'S CLAIM OF
INEFFECTIVE ASSISTANCE OF
COUNSEL

vs.

THE STATE OF IDAHO,

Defendant.

APPEARANCES

Petitioner: Michael DeAngelo for Max Cooke

Respondent: Roger Bourne of Ada County Prosecutor's Office for the State

PROCEEDINGS

This case is a petition for post-conviction relief by Petitioner Max Cooke who was convicted by a jury of Second Degree Kidnapping, Aggravated Battery and misdemeanor Assault. The Court entered a Judgment of Conviction on August 21, 2003, following with an Amended Judgment of Conviction on October 15, 2003.

This matter came before the Court on October 4, 2007 on the Petitioner's Amended Petition for Post Conviction Relief. After receiving memoranda from counsel, the Court took the matter under advisement.

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ISSUES PRESENTED

The Petitioner asserts that his counsel was ineffective in this case and that there is newly discovered evidence that would merit a new trial in this case. The specific areas of ineffective assistance of counsel pertain to the failure of the Petitioner's attorney during the trial, Karl Shurtliff, to obtain an accident reconstruction expert, to present medical testimony about the lack of competency of the victim, Allison Cooke, and finally, that the Petitioner requested his attorney to appeal the case and his attorney failed to do so.

The Petitioner also asserts that the victim, Alison Cooke, signed an affidavit indicating that she did not believe that she was competent to testify at the time of the trial, which should be the basis for the Court ordering a new trial in the case.

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FINDINGS OF FACT

The Court heard evidence from both the Petitioner and Respondent in this case. The Court will find that Allison Cooke did in fact have an accurate recall of the events at the time she testified during the trial and that she was competent to testify. Ms. Cooke signed an affidavit that on its face appeared to assert that because of her head injuries, she was not testifying accurately and truthfully during the course of the trial. The Court, after hearing her testimony, will find that she had an accurate recollection of what occurred on the date of this crime and that her testimony has not been impeached. The Court will further find that there is no basis to find that the victim was not competent to testify during the trial.

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There is no medical evidence before the Court that demonstrates that at the time of her testimony, she was not competent to testify. Although there is a letter from a

1 treating doctor that indicates that she was not competent to testify, that letter was
2 authored during a period of time that she was hospitalized shortly after Ms. Cooke had
3 come out of a coma. The letter does not relate at all to the date of the trial which was
4 several months later.

5 The Court, during the course of the trial, went over the victim's affidavit that was
6 filed in support of the Petitioner's affidavit and she testified that her recollection was
7 accurate and that she testified truthfully at the time of the trial. The Court then cannot
8 find that there is a basis in fact for a new trial because of newly discovered evidence.

9 The Petitioner also asserted that it was error on the part of his attorney not to call
10 an accident reconstructionist. Karl Shurtliff testified that he contacted an accident
11 reconstructionist to determine whether or not the Defendant's vehicle accelerated or
12 decelerated after leaving the road, which was a critical factor in the Aggravated Battery
13 charge. Mr. Shurtliff testified that the accident reconstructionist that he retained
14 reported back to him by phone and that his findings were not favorable to the Petitioner.
15 Mr. Shurtliff testified that he did not call this individual to testify at the trial because in
16 fact his testimony would have bolstered the State's case. No evidence was presented
17 to the Court that an accident reconstructionist would have presented any opinion
18 differently than the State's case. Therefore, the Petitioner has failed to show that there
19 was ineffective assistance of counsel in this regard.
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21 The Petitioner also asserts that there should have been medical testimony
22 presented that the victim's memory and recall of this incident would be subject to
23 question and therefore would create reasonable doubt on the part of the jury. No such
24 evidence was presented during the course of this proceeding and clearly the Court will
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1 not speculate on this issue.

2 For all of these reasons set forth above, the Court will decline to grant a new trial
3 based upon new evidence or find as to these aspects of the case, that the Petitioner's
4 counsel was ineffective during the course of these proceedings.

5 The next issue raised by the Petitioner is that his attorney failed to file an appeal
6 on his behalf after the Petitioner had requested him to do so. Based upon the totality of
7 the evidence presented, the Court will find that the Petitioner did request his counsel to
8 file an appeal on his behalf orally and via letter dated October 1, 2003. The Court will
9 further find that the Petitioner's counsel made no efforts to contact the Petitioner after
10 the verdict was announced in court and therefore did not contact the Petitioner to
11 consult with the Petitioner as to his appeal rights. The Court will find that the Petitioner
12 sought assistance from appropriate employees at the prison, specifically a paralegal, in
13 an effort to file an appeal but the assistance he received resulted in a notice of appeal
14 filed three days past the deadline over confusion as to whether weekends were
15 considered in the deadline. Based upon these facts the Court will find that the
16 Petitioner was not afforded effective assistance of counsel as to the filing of a timely
17 appeal.
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19 CONCLUSIONS OF LAW

20 Under *Roe v. Flores-Ortega*, counsel has a duty to consult with a defendant
21 about opportunities for appeal when: "(1) . . . a rational defendant would want to appeal
22 (for example, because there are nonfrivolous grounds for appeal), or (2) . . . [a]
23 particular defendant reasonably demonstrate[s] to counsel that he was interested in
24 appealing." 528 U.S. 470, 480 (2000). The Court further explained that "although
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1 showing nonfrivolous grounds for appeal may give weight to the contention that the
2 defendant would have appealed, a defendant's inability to 'specify the points he would
3 raise were his right to appeal reinstated,' will not foreclose the possibility that he can
4 satisfy the prejudice requirement where there are other substantial reasons to believe
5 that he would have appealed. *Id.* at 486 (quoting *Rodriquez v. United States*, 395 U.S.
6 327, 330 (1969)).

7 The State argues that the Petitioner is not entitled to relief because he did not
8 demonstrate to counsel that he was interested in appealing on grounds that counsel
9 believed was non-frivolous. However, this is not the requirement under the law.
10 Rather, the requirement under *Flores-Ortega* is to show either that a rational defendant
11 would want to appeal because there were non-frivolous grounds for an appeal, or that
12 this defendant in particular reasonably demonstrated his interest in an appeal. As the
13 Supreme Court indicated, the ultimate question is whether ineffective counsel's breach
14 of duty caused the Petitioner prejudice, and in the facts of this case, prejudice has been
15 reasonably shown by this Petitioner's clear and consistent efforts to seek assistance in
16 filing an appeal.
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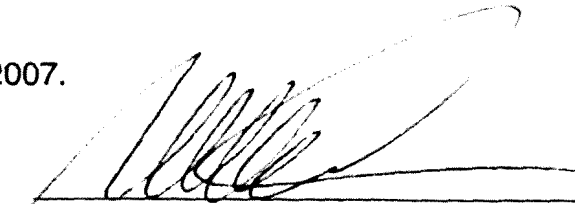
18 Under consistent case authority, the proper remedy in such a case is for a trial
19 court to vacate and reenter its judgment of conviction so as to give the Petitioner an
20 opportunity to file a timely appeal. *See, Beasley v. State*, 126 Idaho 356, 362, 883 P.2d
21 714, 720 (Ct. App. 1994); *see also, Mata v. State*, 124 Idaho 588, 593, 861 P.2d
22 1253,1258 (Ct. App. 1993). This Court will enter an order vacating the prior judgment
23 and reentering that judgment so as to allow Petitioner an opportunity for appeal.
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ORDER

The Court will vacate its Amended Judgment of Conviction entered on October 15, 2003 and will reenter its Amended Judgment as of this date. Petitioner will have forty-two (42) days to appeal this judgment under Idaho Appellate Rule 14(a).

IT IS SO ORDERED.

DATED this 13 day of November 2007.



MICHAEL McLAUGHLIN
DISTRICT JUDGE

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1 CERTIFICATE OF MAILING

2 I hereby certify that on the 13th day of November 2007, I mailed (served) a true

3 and correct copy of the within instrument to:

4
5 MICHAEL DEANGELO
6 DEPUTY ADA COUNTY PROSECUTING ATTORNEY
7 INTERDEPARTMENTAL MAIL

8
9 ROGER BOURNE
10 DEPUTY ADA COUNTY PUBLIC DEFENDER
11 INTERDEPARTMENTAL MAIL

12
13 JOHN C. MCKINNEY
14 IDAHO ATTORNEY GENERAL'S OFFICE
15 PO BOX 83720
16 700 W STATE ST, 4TH FL,
17 BOISE, ID 83720-0010

18
19 ERIK R. LEHTINEN
20 IDAHO STATE APPELLATE
21 PUBLIC DEFENDER'S OFFICE
22 3647 LAKE HARBOR LN
23 BOISE, ID 83703

24
25 M. KARL SHURTLIFF
26 ATTORNEY AT LAW
PO BOX 1652
BOISE, ID 83701

J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Clerk

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

ERIK R. LEHTINEN
Deputy State Appellate Public Defender
I.S.B. # 6247
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

COPY

FILED - COPY	
OCT 11 2006	
Supreme Court _____	Court of Appeals _____
Entered on ATS by: _____	

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,
Plaintiff-Respondent,
v.
MAX RITCHIE COOKE,
Defendant-Appellant.

CASE NO. 32447
MOTION TO AUGMENT RECORD

COMES NOW, defendant-appellant Max Ritchie Cooke, through Erik R. Lehtinen, Deputy State Appellate Public Defender, and moves the Court pursuant to Idaho Appellate Rule 30, for an order augmenting the record in the above-entitled appeal with a copy of the Affidavit of Janel Gardner (*hereinafter*, Affidavit).

Mr. Cooke requests that the record be augmented to include the Affidavit because it is necessary to address at least one of the issues raised on appeal: whether the district court erred in summarily dismissing Mr. Cooke's claim that he was denied access to the courts when a prison paralegal, Janel Gardner, misadvised Mr. Cooke regarding his deadline for filing a notice of appeal and refused to notarize and mail his notice of appeal, thereby preventing Mr. Cooke from timely filing a notice of appeal. The Affidavit is important to this issue because, in his verified petition and in his sworn

affidavit, Mr. Cooke made certain factual allegations regarding Ms. Gardner's conduct which the State claims are rebutted by the Affidavit. Moreover, the district court seems to have relied upon the affidavit in summarily dismissing the aforementioned claim.

Because "[i]t is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, ...and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court," *State v. Coma*, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999) (citation omitted), if the record is not augmented to include the Affidavit, Mr. Cooke will be denied the opportunity to have his appeal fully considered on its merits.

Counsel for the respondent has not been contacted in regard to the instant motion.

DATED this 11th day of October, 2006.

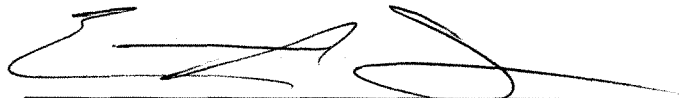


ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of October, 2006, caused a true and correct copy of the attached MOTION TO AUGMENT RECORD to be hand delivered to Attorney General's mailbox at Supreme Court for:

KENNETH K. JORGENSEN
ATTORNEY AT LAW
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010



EVAN A. SMITH
Legal Secretary

ERL/eas

RECEIVED

JUN 30 2005

Prosecuting Attorney's Office
Ada County

NO. _____ FILED
AM. 10:40 P.M. _____

JUL 01 2005

J. DAVID NAVARRO, CLERK
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
Petitioner,)
vs.)
THE STATE OF IDAHO,)
)
Respondent,)

Case No. SPOT 0400770D
AFFIDAVIT OF JANEL
GARDNER

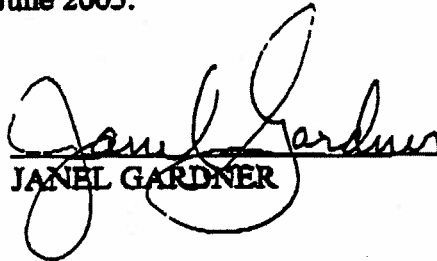
BEING FIRST DULY SWORN your affiant declares as follows:

1. That your affiant is a paralegal at the Idaho Correction's Center, which is the privately run prison south of Boise, in Ada County, Idaho. Your affiant has been so employed since approximately August of 2002.
2. As a paralegal, your affiant assists inmates by giving them qualified claims for access to courts, which includes "packets" for Rule 35 motions, for appeals, and for post conviction petitions. Your affiant also provides notary services to the inmates and mails legal mail for them. Your affiant also keeps track of the

4. As stated above, while your affiant may turn inmates away who have not scheduled an appointment, or whose paperwork was not ready to be signed and notarized, your affiant would not send an inmate away who was at her office at a scheduled time with paperwork ready to be signed and notarized, just because she was too busy. Additionally, your affiant heard inmates discussing with Cooke and other inmates, whether weekends counted in the time computation for appeal. Your affiant was not certain on that issue and so gave no advice to Cooke about the time computation.

Further your affiant sayeth not.

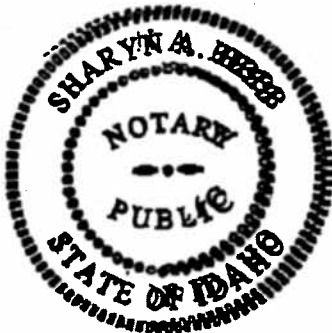
DATED this 30 day of June 2005.




 JANEL GARDNER

STATE OF IDAHO)
) ss.
 County of Ada)

On this 30 day of June 2005, before me, a Notary Public for Idaho, appeared JANEL GARDNER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.





 Notary Public for the State of Idaho
 Residing at: Boise, Idaho,
 My Commission Expires: 4/24/2009

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

SUPREME COURT CASE NO. 32447

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed on the 27th day of October, 2005.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. RITCHIE
Deputy Clerk

SEAL

CERTIFICATE TO RECORD

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